Journal of Natural Resources & Environmental Law

Volume 9
Issue 1 *Journal of Natural Resources & Environmental Law, Volume 9, Issue 1*

Article 7

January 1993

ANILCA under Attack: Will the Right to Travel Wreak Havoc with Subsistence Rights?

Kathy A. Gudgell
University of Kentucky

ANILCA[1] under Attack: Will the Right to Travel Wreak Havoc with Subsistence Rights?

KATHY A. GUDGELL*

INTRODUCTION

It is unfortunate that the term "subsistence rights" was designated to describe the legal hunting and fishing rights of Alaska Native Americans. These "rights" entail more than just eking out a living off the land: it is a way of life that is threatened with destruction. Subsistence rights are protected by law in Alaska, and to the uninitiated, the terminology would suggest that any person "living off the land" should be granted protection. But this interpretation ignores the rich cultural heritage that the Alaska Native associates with the hunting and trapping of animals. The purpose of the Alaska National Interest Land Conservation Act (ANILCA) was to conserve the renewable natural resources of Alaska while providing for those people whose livelihood and well-being depend on the utilization of those resources. ANILCA provides them with a way to continue their ancestral traditions and protects their culture by recognizing a preference for subsistence rights over other uses of the land. To allow a greater number of people to enjoy the subsistence preference defeats ANILCA's purpose and fails to recognize the unique relationship the Alaska Natives have always maintained with their fragile, yet harsh environment.

Under pressure from state legislators, Congress defined subsistence user as any rural resident of Alaska, fearing that the original definition, Native American, would be labelled discriminatory and open to a constitutional attack. Thirteen years and many law-

---

[1] Alaska National Interest Land Conservation Act, 16 U.S.C. §§ 3111-3126 (1985).

* Staff member, JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW; J.D., Class of 1994, University of Kentucky; B.A., Boston State College; B.S.N., University of Kentucky. IMMR Fellow, fall, 1993. I would like to thank the staff of Alaska Legal Services, Fairbanks, Alaska, for their support and encouragement in this endeavor.

suits later, the courts may regret Congress' compromise language. Not only did Congress confuse the issue by allowing individuals without the history and traditions of the Alaska Native to enjoy the subsistence preference, but the "rural" language has not guarded the statute against constitutional attacks. In the most recent litigation, *McDowell v. United States*,[2] the plaintiffs claim, *inter alia*, that the non-rural/rural distinction denies them equal protection by burdening their right to travel.[3] The U.S. Constitution guarantees that no state shall "deny to any person . . . the equal protection of the laws."[4] The plaintiffs in *McDowell* assert that the rural residency requirement of ANILCA interferes with their constitutional right to travel because the same rights to hunt and fish are not afforded them should they choose to exercise their right to travel and move to the city.

This note will discuss whether or not subsistence rights under ANILCA can withstand this constitutional attack. While the federal government appears committed to the preservation of the customs, culture, and mores of the Alaska Native American, the State of Alaska has not been.[5] The conflict in this instance reflects the clash of economic interests and environmental interests: the desire to promote tourist and sporting interests versus the desire to safeguard Alaska's pristine wilderness and the Alaska Native American way of life.

I. BACKGROUND

Alaska Native Americans do not live on reservations[6] and

---

[2] McDowell v. United States, No. A92-531, slip op. (D. Alaska Oct. 7, 1992).

[3] *Id.* at 37.

[4] U.S. CONST. amend. XIV, § 1.

[5] *See* McDowell v. Alaska, 785 P.2d 1 (Alaska 1989)(holding rural distinction in Alaskan subsistence statute violated Alaska Constitution); *see also* Mary Kancewick & Eric Smith, *Subsistence in Alaska: Towards A Native Priority*, 59 UNIV. MISSOURI-KANSAS CITY L. REV. 645, 653 (1991):

> The federal government recognizes a special responsibility for the protection of the welfare of Alaska Native tribes and their tribal governments and culture, just as it does for Native American tribes in the lower forty-eight states. The state of Alaska, for the most part, recognizes no special responsibility for Alaska Natives, but rather a general responsibility for the welfare of all its citizens.

[6] There is one exception. The Metlakatla reservation, an Indian community on Annette Island, was statutorily created in the 1890's and was not abolished by ANCSA. *See* DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 83-88 (1984).

have never entered into treaties with the United States.[7] Their land claims were not addressed by Congress until 1971 and received attention at that time only because oil had been discovered in Prudhoe Bay in northern Alaska in 1968. The oil companies and the state were eager to begin construction on the Trans-Alaska Pipeline but were stymied by conflicting claims to the land.[8] As a result, the Alaska Natives Claims Settlement Act[9] (ANCSA) was passed extinguishing Native land claims in Alaska in exchange for title to forty-four million acres of land and almost one billion dollars. ANCSA also provided for the formation of Native village corporations as well as regional corporations to manage and administer the land and money.[10]

It was quickly apparent that ANCSA did not resolve the Native Americans' problems. Confusion still existed as to their rights to continue time-honored fishing and hunting traditions under ANCSA; the State was only paying lip service to Congress' expectation that "the State . . . take any action necessary to protect the subsistence needs of the Native."[11] Out of these concerns was born Title VIII of ANILCA creating the subsistence preference for rural residents on federal lands in Alaska.

ANILCA was a hotly-contested bill that was signed by President Carter in December 1980, just prior to his leaving office. Fearing a defeat of the bill under President Carter's successor, Ronald Reagan, its proponents were willing to concede certain

---

[7] The United States acquired Alaska from Russia in 1867. In 1871, Congress passed an appropriations bill that disallowed treaty negotiations with Native American tribes. Although neither Russia nor the United States had "conquered" the Alaska Natives and no treaty was ever signed relinquishing their rights, one of the crucial issues facing the Alaska Native today is lack of recognition by the federal government of tribal sovereignty. *See generally* THOMAS R. BERGER, VILLAGE JOURNEY 140 (1985); CASE, *supra* note 6, at 6.

[8] The Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), allowed Alaska to withdraw 103 million acres of land while the Native Allotment Act of 1906, ch. 2469, 34 Stat. 197 (repealed 1971), allowed an individual Alaska Native to homestead 160 acres of nonmineral land. The tribal communities also claimed aboriginal rights in their ancestral lands arising from prior use and occupancy.

[9] 43 U.S.C. §§ 1601-1629 (1971).

[10] BERGER, *supra* note 7, at 20-45. The corporate form was thrust upon the Native Alaskans in an attempt to assimilate them into American culture. The Natives, however, were corporate illiterate and forced to consult and hire non-Native managers. Managers and stock holders are often at odds as the Natives expect the corporation to protect their traditional lifestyle while the corporate officers' goal is to maximize a monetary profit, *id.*

[11] S. REP. No. 92-581, 92d Cong., 1st Sess. 37 (1971).

points in order to gain approval by the 1980 Congress.[12] Besides the subsistence issue, ANILCA added more than one hundred million acres to conservation systems in Alaska. This was an apparent victory for the environmentalists, but in their haste to ensure the passage of the bill, they accepted compromise language, such as the rural resident definition in Title VIII that has caused as many problems as the bill was meant to solve.

II. IMPLEMENTATION OF SUBSISTENCE RIGHTS UNDER ANILCA

The intent of Congress was to allow Alaska to implement Title VIII of ANILCA so long as the state was in compliance with the subsistence preference provisions.[13] Because ANILCA's subsistence preference applies to all federal lands in Alaska, which constitute sixty percent of the state, Alaska was willing and eager to oversee ANILCA's implementation.

The seeds of the implementation problems were planted even before ANILCA was passed. The State enacted a subsistence preference bill in 1978 in anticipation of ANILCA but did not include the rural residency language.[14] In order to comply with ANILCA and gain control of its implementation, the Board of Fisheries adopted regulations that met ANILCA's requirements. The Alaska Supreme Court in *Madison v. Alaska Department of Fish and Game*[15] found that the Board had exceeded its authority by restricting subsistence users based on residency, which was inconsistent with the 1978 state statute. To be able to maintain their supervisory rights over the federal as well as the state lands, the Alaska Legislature responded with a new subsistence law that included the rural language.[16]

---

[12] CLAUSE M. NASKE & HERMAN E. SLOTNICK, ALASKA: A HISTORY OF THE 49TH STATE 234 (1987).

[13] S. REP. No. 96-413, 96th Cong., 1st Sess. 270 (1980) (stating "[t]he State system of local and regional participation shall be in compliance with the requirements of this section and the Secretary [of the Interior] shall not establish local committees or regional councils if the State [complies] . . . .").

[14] There was no residency requirement in the 1978 subsistence law. ALASKA STAT. § 16.05.940(32) (1992) (defining subsistence uses as "the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption").

[15] 696 P.2d 168 (Alaska 1985).

[16] ALASKA STAT. § 16.05.940(32) (1992) (defining subsistence uses as "the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption").

However, the Alaska Supreme Court again struck the rural residency language in *McDowell v. Alaska*,[17] and once again Alaska was out of compliance with ANILCA. The court found that the 1986 statute violated provisions of Article VIII of the Alaska Constitution prohibiting an exclusive right in a natural resource.[18] These provisions reflect Alaska's basic approach to resource management: "1) management of renewable resources must be on the basis of sustained yield; 2) management of resources will recognize multiple uses whenever possible; 3) no private property right may be created in any fishery; and 4) the public should have the broadest possible access to and use of the state's natural resources."[19] Federal administration of the subsistence preference began when temporary regulations were issued in June 1990.[20] This federal intervention led to the unhappy state of affairs created by a subsistence preference applicable to rural Alaskans on federal lands and to all Alaskans on state lands.

III. McDOWELL v. UNITED STATES

Encouraged by their success in whittling away at the subsistence preference in state court, the McDowell plaintiffs are now challenging the federal rural residency requirement in Title VIII of ANILCA on the basis of violations of the Equal Footing Doc-

---

[17] 785 P.2d 1 (Alaska 1989).

[18] The Alaska Constitution states:

> Sec. 3. Whenever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common uses.
>
> . . . .
>
> Sec. 15. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.
>
> . . . .
>
> Sec. 17. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

ALASKA CONST., art. VIII, §§ 3, 15, 17.

[19] James M. Boardman, McDowell v. State of Alaska: *Is A Limited Entry Subsistence System on the Horizon?* 26 WILLAMETTE L. REV. 999, 1006 (1990) (footnotes omitted).

[20] Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,121 (1990) (to be codified at 50 C.F.R. § 100).

trine of the Alaska Statehood Act,[21] the Eleventh Amendment,[22] and the Fifth Amendment. The district court denied the plaintiff's motion for summary judgement on each count. An appeal is pending based partly on the controversy in the lower circuit courts concerning the right to travel and the inclusion of intrastate as well as interstate travel in this right. The following discussion will focus on this controversy in relation to the urban/rural distinction in ANILCA.

IV. THE RIGHT TO INTERSTATE TRAVEL

The right to interstate travel has long been recognized as an implied fundamental right although there is no consensus as to its constitutional source. Justice Byrnes, writing the majority opinion in *Edwards v. California*,[23] cited the Commerce Clause as grounds to find a California statute prohibiting the transport of indigent persons into the state unconstitutional, while Justice Douglas' concurring opinion[24] cited from the early case of *Crandall v. Nevada*[25] that "the right to move freely throughout the nation was a right of *national citizenship*."[26] Justice Jackson[27] preferred to root the right in "that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any state to abridge his privileges or immunities as such."[28] The right to interstate travel has also been found in the due process clause[29] and the equal protection clause.[30] Whatever

---

[21] The Equal Footing Doctrine is derived from the statement within the Alaska Statehood Act which admits Alaska to the Union. "The State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union *on an equal footing with other States in all respects whatever* . . . ." (emphasis added). The Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). The equal footing doctrine also ensures that Alaska has the same rights to manage its own natural resources as do all other States. McDowell v. U.S., No. A92-531, slip op. (D. Alaska Oct. 7, 1992).

[22] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[23] 314 U.S. 160, 172-73 (1941).

[24] *Id.* at 177 (Douglas, J., concurring).

[25] 73 U.S. (6 Wall.) 35 (1867).

[26] 314 U.S. at 178 (emphasis in original).

[27] *Id.* at 181 (Jackson, J., concurring).

[28] *Id.* at 182.

[29] Lutz v. York, 899 F.2d 255, 271 (3d. Cir. 1990) In *Lutz*, the Third Circuit recognized that there was a constitutional right to intrastate travel in the Fourteenth Amendment right to substantive due process. At issue was a law prohibiting cars from "cruising,"

the source of the right, when a statutory scheme appears to violate this unanimously recognized fundamental right, the courts must apply a strict scrutiny test to determine if there is a compelling state interest that warrants the purported violation.[31]

The United States Supreme Court interstate travel cases can be divided into four categories: durational requirements, bona fide or continuing residency requirements, prior residency requirements, and violations of certain civil rights statutes.

A. Durational Requirements

In the seminal case *Shapiro v. Thompson*,[32] the Supreme Court found that a one-year residency requirement for welfare benefits created two classes: those who have resided in the jurisdiction for more than one year and those who have not. This distinction "constitutes an invidious discrimination denying them equal protection of the laws"[33] and interfering with the basic right of the freedom to travel. The right to travel need not be actually violated; the individual need only be penalized by exercising his or her right: "if a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' "[34] The Court did not outlaw waiting periods or residency requirements

---

or traveling repeatedly over the same highway around York, PA. While the Court recognized that intrastate travel was a constitutional right under substantive due process, such a right could be overcome by significant and legitimate state interests, *id.* at 270. The Court held that since the scope of the law was narrow and the interests of public safety and reducing congestion were significant city objectives, this law met the exception criteria and therefore was constitutional, *id.* at 271.

[30] Zobel v. Williams, 457 U.S. 55 (1982). The Supreme Court found that Alaska's Permanent Fund, into which at least 25% of Alaska's mineral income per year must be placed by the state, violated the Equal Protection Clause because it paid out yearly dividends only to Alaska residents who lived in the state prior to statehood in 1958, *id.* at 57. The plaintiffs based their claim of equal protection violation on their right to travel interstate from outside Alaska to inside the state since the law discriminated expressly on this basis, *id.* The Court ruled that since there was no significant state interest which was protected by the law, it was unconstitutional, *id.* at 65.

[31] Shapiro v. Thompson, 394 U.S. 618, 638 (1969). The court stated that "the traditional criteria do not apply in these cases . . . . Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Id.* (emphasis in original).

[32] 394 U.S. 618 (1969).

[33] *Id.* at 627.

[34] *Id.* at 631 (citing United States v. Jackson, 390 U.S. 570, 581 (1986)).

per se, indicating that "such requirements may promote compelling state interests . . . or . . . may not be penalties upon the exercise of the constitutional right of interstate travel."[35]

In another durational residency case, *Dunn v. Blumstein*,[36] the Supreme Court ruled that Tennessee's one-year residency requirement for exercising the right to vote was unconstitutional. The Court found no compelling state interest to justify such a violation of equal protection that impinged on a fundamental right. This Court reaffirmed the distinction between bona fide requirements versus durational requirements, stating that the former could withstand close constitutional scrutiny while the latter could not.[37]

A third case addressing the durational requirements is *Memorial Hospital v. Maricopa County*.[38] Here, the Court determined that a one-year wait to receive nonemergency medical care at a county hospital impermissibly infringed on the right to travel. The appellees sought to distinguish this situation from *Shapiro*,[39] claiming that *Shapiro* applied to an interstate right to travel, while in *Memorial Hospital*, a county hospital was denying in-state residents equal benefits, thereby interfering with the right to *intrastate* travel. Because plaintiff was from out-of-state, the Court refused to address the intrastate issue, stating "[e]ven were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider, such a distinction would not support the judgment of the Arizona court in the case before us."[40] This refusal to reach the intrastate issue has led to much confusion in later lower court decisions.

It was the loss of the right to vote and access to basic necessities (welfare and medical care) that prompted the Court to find that the plaintiffs were penalized for exercising their right to travel. The Court has not set specific guidelines for those violations that might rise to the level of a penalty triggering strict scrutiny. In a subsequent right to travel decision, Justice O'Connor noted that "it is fair to infer that something more than a negligi-

---

[35] *Id.* at 639 n.21.

[36] 405 U.S. 330 (1972).

[37] *Id.* at 343.

[38] 415 U.S. 250 (1974).

[39] Shapiro v. Thompson, 394 U.S. 618 (1969).

[40] *Memorial Hospital*, 415 U.S. at 255-56.

ble or minimal impact on the right to travel is required before strict scrutiny is applied."[41]

In the context of durational requirements, two areas have escaped strict scrutiny because the impact on the right to travel did not trigger the higher standard. In *Starnes v. Malkerson*[42] and *Sturgis v. Washington*,[43] one-year residency requirements were upheld for lower in-state college tuition. The states were able to cite legitimate interests that overcame equal protection concerns. In *Sosna v. Iowa*,[44] an Iowa court dismissed a petition for divorce because neither spouse had resided in the state for one year. The Court upheld the decision because "[a]ppellant was not irretrievably foreclosed from obtaining some part of what she sought . . . . [because] [s]he would eventually qualify . . . . Iowa's requirement delayed her access to the courts, but, by fulfilling it, she could ultimately have the same opportunity for adjudication."[45] The *Sosna* Court found that Iowa's interests were reasonably justified; those seeking a divorce must have a genuine attachment to the state, and the divorce decrees must be insulated from possible later collateral attacks.[46]

B. Bona Fide/Continuing Residency Requirements

The United States Supreme Court has drawn a distinction between durational residency requirements that dictate the length of time one must reside in a jurisdiction before certain benefits are available and bona fide/continuing residency requirements that require only that one live in the jurisdiction to qualify for certain benefits. In *McCarthy v. Philadelphia Civil Service Commission*,[47] a Philadelphia city firefighter was terminated when he moved to New Jersey due to an ordinance requiring residency in Philadelphia. The Court found no question of the "validity of appropriately defined and uniformly applied bona fide residence re-

---

[41] Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 921 (1986) (plurality) (O'Connor, J., dissenting, Rehnquist and Stevens, J.J. joining).

[42] 401 U.S. 985 (1971), *aff'd*, 326 F.Supp. 234 (D. Minn. 1970)(three judge court).

[43] 414 U.S. 1057 (1973), *aff'd*, 368 F. Supp. 38 (W.D. Wash. 1973)(three judge court).

[44] 419 U.S. 393 (1975).

[45] *Id.* at 406.

[46] *Id.* at 406-09.

[47] 424 U.S. 645 (1976)(per curiam).

quirements."[48] The ordinance was upheld as "it was not irrational."[49]

C. *Prior Residency Requirements*

Evaluating a different type of residency requirement, the Supreme Court in *Zobel v. Williams*[50] found that permanent and fixed distinctions based on length of time in the state violated the Equal Protection Clause. The State of Alaska was distributing funds to its citizens according to the date of migration to the state. The Court found that this uneven distribution of funds made the distinction subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[51] This holding was affirmed in two subsequent decisions. In *Hooper v. Bernalillo County Assessor*,[52] a New Mexico statute granting a tax exemption to Vietnam veterans living in the state before a certain date was struck down. In *Attorney General of New York v. Soto-Lopez*,[53] a New York law granting civil service preference to applicants who had entered the military while a resident of the state was struck down.[54] The critical factor for the Court in all three cases was that "the Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the state.' "[55] The benefit, precluded simply on the basis of "nonresidence" at a former time, was irretrievably lost to the newcomer.

---

[48] *Id.* at 647 (quoting Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974)).

[49] *Id.* at 646; *see also* Krzewinski v. Kugler, 338 F.Supp. 492 (D.N.J. 1972)(three judge court)(upholding a city ordinance requiring police officers and firefighters to reside within the municipality under the strict scrutiny test).

[50] 457 U.S. 55 (1982).

[51] *Id.* at 60.

[52] 472 U.S. 612 (1985).

[53] 476 U.S. 898 (1986)(plurality).

[54] While the Court in *Soto-Lopez* explicitly states that their opinion rests on the fact that the civil service preference penalizes certain veterans who have exercised their right to migrate, thereby triggering the stricter standard, the *Zobel* and *Hooper* Courts never reach the strict standard but state the statutes do not pass a rational-basis test under the Equal Protection Clause. *Soto-Lopez*, 476 U.S. at 905-06; *see Hooper*, 472 U.S. at 618 n.6.

[55] *Soto-Lopez*, 476 U.S. at 908 (quoting *Hooper*, 472 U.S. at 623 and *Zobel*, 457 U.S. 55, 59 (1982)).

D. Civil Rights Violations

The Court has decided several cases involving the right to travel in the context of a civil rights violation. In these instances, a fundamental right must be violated in order for the plaintiff to maintain an action under the particular civil rights statute. For example, in *Griffin v. Breckenridge*[56] the Court found a violation of 42 U.S.C. § 1985(3)[57] when two black men were threatened and beaten by two white men while traveling on the highway. The Court determined that not only must there be a violation of a fundamental right but that there must also be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[58] The plaintiffs properly stated a cause of action under § 1985(3); the case was remanded to the District Court for a determination of whether, *inter alia*, their right to travel interstate had been violated.[59]

The language of ANILCA does not violate any of these classifications. There is no durational requirement and no fixed and permanent classifications. The legislative history reports that "this amendment is not intended to impose a 'durational' rural residency requirement in the definition or impede the traditional movement of Alaska residents between the rural areas and the major population centers and vice versa."[60] ANILCA's residency requirement falls more into the *McCarthy*-like[61] category of continuing residency requirements, requirements which have been consistently upheld. There is a rational connection between the statute and the purposes it was to serve. Congressional policy is expressly stated in ANILCA: "Consistent with sound management principles, and the conservation of healthy populations of

---

[56] 403 U.S. 88 (1971).

[57] If two or more persons in any State or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . .

42 U.S.C. § 1985(3) (1988).

[58] *Griffin*, 403 U.S. at 102.

[59] *Id.* at 106-07.

[60] S. REP. No. 413, 96th Cong., 1st Sess. 233 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5177.

[61] *See* McCarthy v. Philadelphia Civil Service, 424 U.S. 645 (1976)(per curiam).

fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands."[62] To provide the least adverse impact on subsistence users while conserving the wild, renewable resources, the preference should remain as limited as possible. Nor does ANILCA impose a permanent deprivation based on the date of migration. A newcomer to Alaska may choose to reside in any part of Alaska; subsistence rights are incidental to that choice and not irretrievably lost because of that choice.

V. THE RIGHT TO INTRASTATE TRAVEL

The Supreme Court has not recognized a fundamental right to intrastate travel and expressly declined to address the issue in *Memorial Hospital*.[63] This has left a void that the circuit courts have unsuccessfully attempted to fill: the First Circuit impliedly recognizes the right to intrastate travel;[64] the Second and Third Circuits expressly recognize it;[65] a Fourth Circuit district court, the Fifth Circuit, and the Sixth Circuit reject it;[66] the Seventh Circuit has not reached the issue;[67] the Eighth, Ninth and Tenth Circuits have not spoken to the issue; and an Eleventh District Court recognizes the right.[68]

---

[62] 16 U.S.C. § 3112(1) (1985).

[63] *See supra* note 40 and accompanying text.

[64] *See* Cole v. Housing Auth. of Newport, 435 F.2d 807 (1st Cir. 1970).

[65] King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971)(holding five-year waiting period for federally-funded low income housing unconstitutional where the two plaintiffs were in-state residents); Lutz v. City of York, Pa., 899 F.2d 255, 268 (3d Cir. 1990)(recognizing right to travel through public spaces but upholding anti-"cruising" ordinance after intermediate scrutiny).

[66] Eldridge v. Bouchard, 645 F. Supp. 749, 753-55 (W.D.Va. 1986)(finding no fundamental right to intrastate travel and upholding a difference in pay based on county of residence under the rational basis test), *aff'd*, 823 F.2d 546 (4th Cir. 1987); Wright v. City of Jackson, Miss., 506 F.2d 900 (5th Cir. 1975)(upholding an ordinance requiring municipal employees to live within city limits and finding no fundamental right to intrastate travel); Wardwell v. Bd. of Educ., 529 F.2d 625, 627 (6th Cir. 1976)(upholding an ordinance requiring teachers to live within school district and finding no fundamental right to intrastate travel).

[67] Andre v. Bd. of Trustees, 561 F.2d 48, 53 (7th Cir. 1977)(upholding an ordinance requiring certain municipal employees to establish residency within city limits: "inasmuch as a residency requirement is not involved in this case, we need not consider whether a right of intrastate travel should be acknowledged"), *cert. denied*, 434 U.S. 1013 (1977).

[68] Pottinger v. City of Miami, 810 F. Supp. 1551, 1579 (S.D. Fla. 1992).

The earlier intrastate travel decisions of the First, Second, and Third Circuits adopted traditional interstate travel theory and applied it to in-state residents, finding violations only in the context of durational requirements.[69] The First Circuit was the first court to address the issue in *Cole v. Housing Authority of Newport*.[70] The *Cole* Court did not specifically address the right to travel intrastate but found unconstitutional a two-year waiting period for low-income housing affecting both in-state and out-of-state residents. The court interpreted the scope of "travel" as addressed in the *Shapiro* decision: travel as "migration with intent to settle and abide" because, otherwise, "any residency requirement might be thought to penalize the right to travel if 'travel' is used in the sense of movement."[71] Using the latter definition, a tollbooth on the highway would be unconstitutional.[72] Other courts adopted this interpretation of travel, and even the Supreme Court refers to the "right to migrate" in the 1986 *Soto-Lopez* decision.[73]

The 1971 *King* decision of the Second Circuit,[74] striking down a five-year residency requirement for low-income housing, did not attempt to identify a constitutional source for the right to intrastate travel but found it to be a logical extension of the right to interstate travel: "It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."[75]

The more recent intrastate travel cases have transformed the *Cole* definition of travel from the "right to migrate and settle"

---

[69] *See* Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972)(invalidating a five-year residency requirement before Wilmington resident could run for mayor), *aff'd*, 485 F.2d 1151 (3d Cir. 1973); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971)(invalidating a five-year waiting period involving in-state resident), *cert denied*, 404 U.S. 863 (1971); Cole v. Hous. Auth. of Newport, 435 F.2d 807 (1st Cir. 1970)(holding unconstitutional a two-year residency requirement involving in-state petitioner).

[70] 435 F.2d 807 (1st Cir. 1970).

[71] *Id.* at 811.

[72] Elizabeth A. Johnson, Note, Alaska Pacific Assurance Co. v. Brown: *The Right to Travel and the Constitutionality of Continuous Residency Requirements*, 2 ALASKA L. REV. 339, 343 (1985).

[73] *See* 476 U.S. 898, 903 (1986). "Our *right-to-migrate* cases have principally involved the latter, indirect manner of burdening the right." *Id.* (emphasis added)

[74] *See* King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971)(holding unconstitutional a five-year waiting period involving an in-state resident), *cert. denied*, 404 U.S. 863 (1971); *see also* note 65 and accompanying text.

[75] *King*, 442 F. 2d at 648.

into a right to move about freely. Building on the language quoted above from *King*, the Second Circuit found an infringement on one's right to travel freely outside the durational requirement violation of interstate travel case law in *Spencer v. Casavilla*.[76] In *Spencer* the claimant's son, a young black man, had been beaten to death by the four white defendants. In order to maintain a civil rights action under 42 U.S.C. § 1985(3),[77] it was necessary for the court to find a violation of a federally-protected right. The court held that plaintiff's complaint stated a valid claim that his right to travel within New York State without being subjected to a racially motivated attack had been violated.[78] The case was remanded for further proceedings. In the Third Circuit, the court found that there is a constitutional right to "cruise" (the right to repeatedly drive around the major thoroughfares of town) but upheld an anti-cruising ordinance in *Lutz v. City of York, Pennsylvania*.[79] The court determined that the source for this "right to travel locally through public spaces and roadways"[80] is the Due Process Clause which "protects unenumerated rights 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[81] The court admitted that the government must have some "flexibility to regulate access to and use of, the publicly held instrumentalities of . . . travel."[82] If the court were to apply the strict scrutiny test demanded by *Shapiro* to the newly created right to travel freely, the ordinance would not have passed muster. The court's solution was to borrow an intermediate scrutiny from First Amendment jurisprudence that would tailor the test for constitutionality to the context of the situation; "reviewing all infringements on the right to travel under strict scrutiny is just as inappropriate as applying no heightened scrutiny to any infringement."[83]

A district court in the Eleventh Circuit also adopted the broader definition of travel in *Pottinger v. Miami*,[84] finding a cause of action under another civil rights statute, 42 U.S.C.

---

[76] 903 F.2d 171 (2d Cir. 1990).

[77] *See supra* notes 57-59 and accompanying text.

[78] 903 F.2d at 176.

[79] 899 F.2d 255 (3d Cir. 1990).

[80] *Id.* at 268.

[81] *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110, 122 (1989)(plurality)).

[82] 899 F.2d at 269.

[83] *Id.*

[84] 810 F. Supp. 1551 (S.D. Fla. 1992).

§ 1983.[85] Here, a class action was brought on the behalf of all involuntarily homeless people of Miami. Many of them had been arrested for violations of ordinances prohibiting loitering, obstructing sidewalks, and sleeping in the park after hours. The court found the ordinances unconstitutional partly because they infringed on the plaintiffs' right to intrastate travel.[86]

VI. WHETHER ANILCA VIOLATES THE RIGHT TO INTRASTATE TRAVEL DEPENDS ON THE MEANING ATTRIBUTED TO 'TRAVEL'

If the Supreme Court were to recognize a constitutional basis for the right to intrastate travel, the ANILCA distinctions would not violate that right under traditional interstate travel theory because there are no durational residency requirements and no permanent classifications. Using the expanded definition of travel, minimal burdens could be considered unconstitutional.[87] Even bona fide residency requirements would fall prey to the overreaching "movement" definition of travel.[88] The difficulty of finding any residency requirement valid would be compounded by the strict standard of review required by the violation of a fundamental, federally-protected right as it is extremely difficult for any statute to pass the seemingly insurmountable compelling state interest standard.[89]

---

[85] Every person who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983 (1993).

[86] The court was also relying on two Supreme Court cases that had found anti-loitering laws void for vagueness. *See* Kolender v. Lawson, 461 U.S. 352 (1983)(holding a California statute that required production of identification upon police officer's request unconstitutional); Papachristou v. City of Jacksonville, 405 U.S. 1546 (1972)(holding a Florida loitering statute unconstitutional because of arbitrariness and lack of notice).

[87] *See* Cole v. Housing Auth. of Newport, 435 F.2d 807 (1st Cir. 1970). "Any residency requirement might be thought to penalize the right to travel it 'travel' is used in the sense of movement. A resident of Maine vacationing for a month in New Hampshire might be penalized for traveling if he could not obtain the benefits of a library card in New Hampshire during his vacation." *Id.* at 811.

[88] *See* Andrew C. Porter, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820 (1992).

[89] Chief Justice Burger states that "[t]o challenge such lines [voting requirements] by the 'compelling state interest' standard is to condemn them all." Dunn v. Blumstein, 405 U.S. 330 (1972) (Burger, C.J. dissenting). *But see* Krzewinski v. Kugler, 338 F.Supp. 492 (D.N.J. 1972)(upholding a city ordinance requiring police officers and firefighters to reside within municipality under a strict scrutiny test); Korematsu v. United States, 323 U.S. 214

A solution to this inflexibility would be to adopt the Third Circuit's creative use of the intermediate standard of review in right to travel cases. The magnitude of the burden on the right to travel would determine the level of scrutiny applied to the violation. A direct burden with substantial infringement of one's right to travel, whether interstate or intrastate, would be the only scenario calling for strict scrutiny. Lesser burdens that impose a smaller degree of infringement on the right to travel would receive a more relaxed scrutiny ranging from the intermediate level down to the rational basis test. Borrowing terminology from gender discrimination theory, the intermediate test would require that the questionable classifications in the statutory language be substantially related to important governmental objectives.[90]

In the same vein as the Third Circuit proposal and gender discrimination is Alaska's "sliding scale" equal protection analysis. Alaska was unhappy with the two-tiered system that required either a rational basis test, which could almost always be met, or the compelling state interest test, which could almost never be met.[91] As a result, the Alaska Supreme Court formulated a single standard of review in *State v. Ostrosky*.[92] "The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme."[93] The standard of review does not turn on whether a right is fundamental or not, but on the importance of the individual's interest in that right. The amount of judicial weight that is given to that interest determines the standard of review. The statute's purpose must be closely examined, and the classification will be found unconstitutional if there is a "less restrictive alternative" that would accomplish the same purpose.[94]

(1944)(upholding a statute imposing restrictions on a single racial group under a strict scrutiny test).

[90] *See* Lawrence G. Sager, *Some Observations about Race, Sex, and Equal Protection*, 59 TULANE L. REV. 928 (1985).

[91] *See* Michael B. Wise, *Northern Lights—Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1, 17-21 (1986).

[92] 667 P.2d 1184 (Alaska 1983)(holding limited entry restriction did not violate Alaska constitution provisions prohibiting exclusive rights of fishery because the Limited Entry Act's objectives are legitimate and fairly and substantially furthered by free transferability).

[93] *Id.* at 1192-93.

[94] Alaska Pacific Assur. Co. v. Brown, 687 P.2d 264 (Alaska 1984).

VII. ANILCA WOULD PASS INTERMEDIATE SCRUTINY

Alaska is more than twice the size of Texas[95] with a population less than San Francisco.[96] About one-third of the population lives in rural villages.[97] Many of these villages are inaccessible by car. While there is a growing mixed cash/subsistence economy in the villages, there is still a heavy reliance on the harvest of wild, renewable resources.[98] Most of these villagers are Native Americans to whom hunting and fishing is not a matter of sportsmanship, but an integral part of their spiritual and social customs as well as a matter of survival. As one Indian Elder has said: "[T]he land is keeping us alive; we are connected to the land."[99]

Justice John Marshall defined and clarified the federal government's relationship with the Indians in a trilogy of cases in the early 1800's. Due to the Indians' unique position as a "domestic dependent nation," there was a trust-like relationship between the federal government and the tribes that resembled "that of a ward to his guardian."[100] As Felix Cohen, noted authority on Indian Law, has stated: "the trust obligation apparently requires that [federal] statutes be based on a determination that the Indians will be protected."[101] The Supreme Court recently agreed with Cohen in *Montana v. Blackfeet* when it refused to let Montana tax the tribe's royalty interests in certain oil and gas leases, stating that "statutes are to be construed liberally in favor of the In-

---

[95] NASKE & SLOTNIK, *supra* note 12, at 5.

[96] RESEARCH AND ANALYSIS SECTION, ALASKA DEP'T OF LABOR, ALASKA POPULATION FOR BOROUGHS, CENSUS AREAS AND PLACES, 1980-90 (JUNEAU, ALASKA, JANUARY 28, 1991), *reprinted in* 14 COMMUNITY RESEARCH Q. 63 (1991). Population figures for 1990 show a thirty-seven percent increase from 1980 for a total of 550,043, *id.*

[97] NASKE & SLOTNIK, *supra* note 12, at 5.

[98] RICHARD A. CAULFIELD, DIVISION OF SUBSISTENCE, ALASKA DEP'T OF FISH & GAME, TECH. PAPER NO. 16, SUBSISTENCE LAND USE IN UPPER YUKON-PORCUPINE COMMUNITIES (1983). In Fort Yukon, at least 50% of the meat and fish were derived from local sources, *id.* Other villages reported similar numbers, *id.*

[99] Interview with Jim Christian, Elder of Native Village of Venetie, Alaska (March, 1993)(conducted as part of a grant funded by the American Native Association to provide a written history of Alaska Native traditions and culture).

[100] Heather Noble, *Tribal Powers to Regulate Hunting in Alaska*, 4 ALASKA L. REV. 223, 245-46 (1987) (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)(defining the right to discovery and aboriginal title in the context of a property dispute)); *cf.* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (holding the federal government had plenary power when dealing with Native Americans but Georgia had no jurisdiction over tribal lands); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (explaining that an Indian tribe is not a foreign state as discussed in the Constitution).

[101] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (1982).

dians, with ambiguous provisions interpreted to their benefit."[102] Some commentators believe that such a strong fiduciary obligation attaches to this federal trust that the original language in ANILCA defining subsistence users as Native Americans would pass the strictest standard of review.[103]

Congressional support reflecting this trust relationship is demonstrated by the exemptions particular to the Alaska Natives in the Marine Mammal Protection Act[104] (MMPA), the Migratory Bird Treaties with Great Britain, Mexico and Japan,[105] and the Endangered Species Act[106] (ESA). The courts have followed suit. The Ninth Circuit recognized the uniqueness of the Alaska Native subsistence rights in *U.S. v. Nuesca*.[107] In *Nuesca*, two Hawaiian Natives were convicted for violations of the ESA after catching two green sea turtles and a monk seal. Defendants argued that their equal protection rights were violated because the Alaska Native, who was similarly situated as an aboriginal people, could hunt endangered species without penalty while Hawaiian Natives were prosecuted. The court stated that "Congress had ample reasons to create exceptions to certain laws for the benefit of native Alaskans, and to refrain from creating exceptions for other groups."[108] The convictions were affirmed. The "ample reasons" were not elaborated but would include the lack of alternative food sources, the isolation of the rural communities, the vast distances and topographical barriers that separate villages, and the severity of the climate.

Besides congressional and judicial recognition of the special subsistence needs of the Alaska Native, the International Whaling Commission also acknowledged the Native's reliance on wildlife.

---

[102] 471 U.S. 759, 766 (1985).

[103] *See* Kancewick & Smith, *supra* note 5.

[104] 16 U.S.C. § 1371(b) (1985). "[T]he provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking is for subsistence purposes." *Id.*

[105] *See* CASE, *supra* note 6, at 280.

[106] 16 U.S.C. § 1539(e)(1) (1993). "[T]he provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by (A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or (B) any non-native permanent resident of an Alaskan native village; if such taking is primarily for subsistence purposes." *Id.*

[107] 945 F.2d 254 (9th Cir. 1991).

[108] *Id.* at 257.

The Commission relaxed an absolute ban on the hunting and killing of bowhead whales for the Inupiat villagers of northern Alaska. The hunting of whales was a community endeavor that provided a social and cultural exchange as well as food. The ban had seriously interfered with their "collective and cooperative economic and social relationships."[109] The villages are now allotted a yearly quota of whales based on an annual accounting of the whale population.

The ANILCA rural classification is not a direct burden on the right to travel interstate or intrastate. It has, at most, a negligible or minimal impact on the exercise of this right. The non-rural resident is not denied basic necessities as there are other food sources readily available in an urban area. In contrast, there may be no other food sources available to the rural resident. If all residents were to enjoy the subsistence preference, fewer resources would be available to both rural and non-rural residents with a corresponding restriction based on need.[110] For those urban dwellers who have moved from a rural area, the right is easily reinstated. The loss of the subsistence preference is not permanent.

Both conservation and subsistence rights are important governmental interests. The rural residency language of ANILCA attempts to balance these two competing interests in the least restrictive manner possible while still meeting the goals of each. The individual urbanite is not deprived of basic needs, and his or her interest in this matter is not of a high order. In light of the federal trust doctrine that imposes a heavy duty of responsibility towards Native Americans as well as a strong national interest in conservation, ANILCA would survive an intermediate scrutiny. In order to ensure an adequate supply of fish and game for everyone, it is essential to control the number of people to whom subsistence rights apply. If an anti-cruising ordinance can pass an intermedi-

---

[109] David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?*, 60 U. COLO. L. REV. 1009, 1027 (1989).

[110] Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria: (1)customary and direct dependence upon the populations as the mainstay of livelihood; (2)local residency; and (3)the availability of alternative resources.

16 U.S.C. § 3114 (1980).

ate scrutiny, the protection of a people's livelihood can also pass an intermediate scrutiny.

CONCLUSION

It is unlikely that the Supreme Court will recognize a new fundamental right that has no expressly identifiable source, such as the right to intrastate travel. The Court has made it clear in *Bowers v. Hardwick*[111] that it will not embark on such determinations: "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[112] Should the Court adopt such a right, it would be unlikely to adopt the expanded definition of travel. The Supreme Court applied the *Cole* language to the most recent prior residency requirement violation in *Soto-Lopez*, describing travel as the right to migrate. In discussing the source of the right to travel, the *Soto-Lopez* decision further clarifies the definition of travel: "The textual source of the constitutional right to travel, or, more precisely, *the right of free interstate migration*, though, has proved elusive."[113]

In another recent case addressing a possible violation of 42 U.S.C. § 1985(3),[114] *Bray v. Alexandria Women's Health Clinic*,[115] Justice Scalia does not find a violation of the right to travel. In this case brought against anti-abortionists obstructing women's access to abortion clinics, the Court stated

> actual barriers to movement' that would have resulted from Petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another . . . Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against

---

[111] 478 U.S. 186 (1986)(holding a Georgia statute banning sodomy was lawful as there is no constitutional right to practice sodomy).

[112] *Id.* at 194.

[113] 476 U.S. 898, 902 (1986)(plurality)(emphasis added).

[114] 42 U.S.C. § 1985(3) (1988); *see supra* notes 57-59 and accompanying text.

[115] 113 S.Ct. 753, 763 (1993).

> travelers from other States, unless it is applied discriminatorily against them.[116]

There is no discrimination against non-rural residents of Alaska. The *McDowell* plaintiffs do not fall into a "suspect group" that would trigger strict scrutiny under Equal Protection; they are not "a discrete and insular minority that is unable to shake or rise above the bonds and stigma of its minority status: [c]ourts have been unwilling to extend suspect class status to any classification other than race, alienage, and national origin."[117]

On a larger scale, this is a classic case of environment versus development. Before 1958, less than one percent of Alaska was in private hands. The Statehood Act plus ANCSA and ANILCA withdrew more than two hundred and fifty million acres for the State, for claims by the Natives, and for conservation by the federal government.[118] Since then, urban population has increased at a greater rate than the rural population, the tourist trade has boomed, more and more sport hunters and fishers want to experience and take advantage of the "last great frontier," new roads making more land accessible are being planned, and greater development of the mineral industry has been proposed. Subsistence rights stand in the way of some of these growth spurts so that while the right to travel may not further limit the Native American way of life, future attacks on ANILCA are sure to come. Governor Hickel, expounding on one of his four lawsuits against the United States[119] challenging federal control in Alaska, claims the statehood act "guarantee[d] that we would use the land to create an economy,"[120] and he intends to hold the government to its promise.

---

[116] *Id.* at 795.

[117] Eldridge v. Bouchard, 645 F. Supp. 749, 752 (W.D. Va. 1986).

[118] See, COHEN, *supra* note 101, at 758-59.

[119] See Brian S. Akre, *Hickel Readies Fed Suit*, FAIRBANKS DAILY NEWS-MINER, July 23, 1993, at 1. "Congress 'induced' Alaskans to ratify the Statehood Act in 1958 by promising the state broad opportunities to develop federal lands." *Id.* (filing suit seeking to recover $29 billion that the State has lost by ANILCA's withdrawal of land from development. The other three suits address the State's claim to navigable waters, the State's right to manage fish and game on federal lands, and the federal ban on foreign export of North Slope oil.).

[120] Glenn Boledovich, *State to Sue Feds-Hickel*, FAIRBANKS DAILY NEWS-MINER, June 18, 1993, at A1.